



# POLICY & PROCEDURE

## ELKHART LAKE POLICE DEPARTMENT

SUBJECT: **CUSTODIAL INTERROGATION**

SCOPE: All Department Personnel  
DISTRIBUTION: Policy & Procedure Manual

REFERENCE: WI State Statutes: 968.073, 972.115

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INDEX AS: Electronic Recording of Custodial Interviewing Generally  
Procedures Specific to Handheld Recording Devices  
Recording of Custodial Questioning Procedures

PURPOSE: The purpose of this Policy & Procedure is to establish guidelines, policies and procedures for members of the Elkhart Lake Police Department for electronic recording and the associated use, management, storage and retrieval of recordings of custodial questioning. This Policy & Procedure is intended to reduce the risk of wrongful conviction of innocent persons and to ensure that the highest quality evidence possible is obtained from custodial interviews.

This Policy & Procedure consists of the following numbered sections:

- I. DEFINITIONS
- II. POLICY
- III. PROCEDURE

### I. DEFINITIONS

**ANALOG RECORDING:** An electronic recording typically stored on a VHS, cassette or micro-cassette tape.

**AUDIOVISUAL:** A recording with both video and audio.

DIGITAL RECORDING: An electronic recording typically stored on a CD, DVD or microchip, being recordings that can be viewed and stored on a computer.

ELECTRONIC RECORDING: A visual and/or audio recording using digital or analog storage format.

(MVARs) MOBILE AUDIO/VIDEO RECORDING SYSTEM (EQUIPMENT): Portable, wireless, electronic devices designed for capturing audio and/or video recordings. This includes body worn cameras, and/or in squad mobile video/audio recording system.

RECORDED MEDIA: Refers to audio and/or video signals recorded on any of several storage media, including analog tape (VHS, SVHS, Hi 8mm), digital tape (DV) or other portable digital storage media (CD, DVD, hard drive, USB drive, etc.)

## II. POLICY

A. Electronic recording provides persuasive documentary evidence and helps defend against civil litigation and allegations of officer misconduct. To maximize the effectiveness of electronic recording and the integrity of audio and/or video documentation, officers assigned the use of recording devices shall adhere to the operational objectives and protocols outlined in this policy. For purposes of this Policy, there shall not be a distinction between the terms "questioning", "interviews" and "interrogations".

## III. PROCEDURE

A. Recording Purpose. Electronic recording is intended:

1. To accurately capture statements and events during the course of a custodial questioning;
2. To enhance the ability to document and review statements and actions for internal reporting requirements and for courtroom preparation and presentation;
3. To capture visual and/or audio information for use in current and future investigations.
4. To document acknowledgment of and rigid adherence to suspects' rights and the law;
5. To allow the questioning process to become part of the investigation's collection of information, rather than simply a means to secure an admission or a confession;
6. To allow the opportunity to review the process that led to the confession or admission; and

7. To preserve the integrity of officers and the investigative process.

B. Recording; Questioning, Interviewing, and Interrogations

1. Whenever possible and practical, officers should electronically record all custodial questioning.

Recording should begin at the start of questioning and continue without interruption until questioning ends. Officers should record anytime they would normally advise constitutional warnings, regardless of where the questioning occurs -"A *Miranda* moment is a recording moment."

2. Recording may not be possible if:

- a) The recording device does not work and there is no other device reasonably available;
- b) The officer operating the recording device inadvertently fails to operate it properly;
- c) During the interrogation, the recording device malfunctions without the officer's knowledge; or
- d) A person makes a statement to law enforcement spontaneously or in response to a routine booking question.

C. Availability of Recording Equipment. It is the responsibility of this Department to ensure that audio and/or video recording equipment is available and properly set up according to its manufacturers' recommendations.

D. Recording Considerations. Officers should comply with the following procedures during custodial questioning situations:

1. During custodial questioning, regardless of where it occurs, the recording should begin at the start of the contact and continue without interruption until the questioning ends. Gaps in an electronic recording could invite allegations of misconduct; do not use voice-activated equipment, since a recorded event should be an accurate documentation of what happened.

- a) Police Department; utilizing the in house video recording system.
- b) Squad Cars; utilizing MVARs
- c) Portable; in the event a) and b) above were unavailable, non-functional, not practicable etc., a portable audio/video camera is available with an accompanying tripod.

However, recording might not be possible if:

- a) The recording device does not work and there is no other device reasonably available;
  - b) The officer operating the recording device inadvertently fails to operate it properly;
  - c) During questioning, the recording device malfunctions without the officer's knowledge;
  - d) A person makes a statement to law enforcement spontaneously or in response to a routine booking question; or
  - e) The suspect refuses to speak while being recorded (in general, officers should only conduct unrecorded questioning based on a suspect's refusal if the refusal itself is recorded).
2. Digital audiovisual recording is preferred when possible and practical. Digital audio-only and/or analog recording, however, is acceptable.
- E. Inspection; Maintenance. Department personnel are responsible for inspection and general maintenance of equipment assigned. Officers are required to test the MVARS units during their squad checks at the beginning of their shift.
1. Equipment Malfunctions. Malfunctions, damage or theft of equipment shall be reported to the Chief of Police or designee promptly if recording equipment fails or malfunctions.
- F. Mandatory Recording Situations.
1. Recording is mandatory for:
    - a) Any custodial questioning of juveniles [persons under seventeen (17) years of age] for an offense that could be a crime if prosecuted under the Wisconsin Statutes. The Wisconsin Supreme Court, in *State v. Jerrell C.J.*, 283 Wis. 2d 145, 699 N.W. 2d 110 (2005), now requires that "all custodial interrogations of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention;
    - b) Any custodial questioning of adults [persons seventeen (17) years of age or older] for a crime that is a felony; and **(WILEAG CORE 15-6.3.6)**
    - c) Any situation or incident that the officer, through training and experience, believes should be audibly and/or visually recorded. However, Department policies and the underlying state statutes address situations and suspects involved in delinquent acts, not routine ordinance violations.

"Delinquent acts" are those acts which would be crimes if perpetrated by adults.

"Crimes" are those offenses which are potentially punishable by imprisonment or a fine; conduct punishable by only forfeiture is not a crime. Thus, the recording requirements are not applicable to most ordinance violation situations, but it is recommended.

#### G. Operation of the Equipment.

1. To help ensure accuracy and consistency of accounts, officers are encouraged to review recordings when preparing written reports of events.
2. With the exception of police radios, officers shall ensure that the volume from other electronic devices does not interfere with recordings.
3. Officers shall not erase, alter, reuse, modify or tamper with recordings. Only the Chief of Police or his designee may erase and reissue previously captured recordings and even then may only do so pursuant to the provisions of this Policy & Procedure and Policy & Procedures 10.01: Records, 10.04: Open Records, and 10.05: Retention of Records.
4. To prevent damage, original recordings shall not be viewed in any equipment other than the equipment issued or authorized by the Chief or his designee.
5. Recordings shall be marked and processed as evidence and then submitted to the property custodian to be held and/or duplicated for prosecution, records requests, etc. Recordings made with squad cameras, video flashlights, or body cameras will be stored on the video storage server. A CD/DVD of the recording should be made by the investigating officer if it is needed for evidentiary purposes.
6. Except as previously noted, when recording equipment is activated to document an event, the equipment should not be deactivated until the event has been concluded.

#### H. Duplication of the Recorded Media.

1. All recording media, recorded images and audio recordings are the property of the Department.
2. Unofficial or unauthorized dissemination outside of the agency is strictly prohibited without specific written permission of the Chief of Police/designee. Refer to Policy & Procedure 10.01: Records.
3. To prevent damage to, or alteration of, the original recorded media; it shall not be copied, viewed or otherwise inserted into any device not approved by the Chief of Police or designee.

4. When possible and practical, a copy of the original media shall be used for viewing by investigators, staff, training personnel and the courts (unless otherwise directed by the courts) to preserve the original media in pristine condition.
  5. At the conclusion of any trial proceedings or as otherwise authorized by the prosecutor's office for which the media was required, all copies shall be retained in accordance with Policy & Procedure 10.05: Retention of Records.
- I. When to Consider Giving Notice or Obtaining Consent for Recording.
1. Law enforcement authorities are not required to inform adult or juvenile suspects of recording.
  2. Lack of consent to recording does not affect the admissibility of a recorded statement.
  3. Giving notice of recording can foster public trust in law enforcement.
  4. Officers should trust their discretion about whether a particular suspect is likely to be inhibited by notice of recording.
- J. The Role of Written Interview Summaries. Officers shall continue to prepare written summaries (police reports) of interviews and continue to obtain written statements from suspects. Electronic recording is not a substitute for traditional methods of memorializing interviews.

Defendants might not dispute the questioner's version of what occurred during an interview, and some cases might be resolved based on written reports alone, thus minimizing the costs of copying or transcribing recordings. Written statements are important because they can provide clear and concise evidence of guilt. Statements also tend to demonstrate that incriminating statements were made voluntarily. It is not necessary for written statements to include all the details of an interview; it is sufficient to summarize the relevant portions.

K. Retention of Recordings as Records; Media Access.

1. In order to ensure that electronic recordings of any person are available if litigation occurs, law enforcement authorities should preserve recordings made during the investigation of a crime until every person in custody as a result of the conviction, adjudication or commitment for that crime has reached his or her discharge date. Recordings in unsolved/uncharged investigations should be preserved until the statute of limitation for that offense has expired.
2. Media outlets are not entitled to access custodial interrogation recordings prior to the conclusion of a trial. Sec. 972.115(5), Wis. Stats., specifically exempts release of recordings prior to trial.

Electronic recordings shall not be open to public inspection under Sees. 19.31 or 19.39, Wis. Stats., until one of the following events occurs:

- a) The person is convicted or acquitted of an offense that is a subject of the interrogation; or
  - b) All criminal investigations or prosecutions to which the interrogation relates are concluded.
3. Custodial-type taping may not be required by law during traffic detentions - taping is required only for custodial questionings. Traffic stops are typically not considered to be custodial. However, if the traffic stop matures into an arrest situation, then subsequent questioning would require taping. In addition Officers should record their interactions while in direct contact with the public during traffic stops.
4. If a suspect in a custodial questioning makes an ambiguous request for a lawyer during the recorded *Miranda* waiver time or during the questioning, the officer should attempt to clarify the request [such as "It's up to you: do you want a lawyer or not?" or "I've read you your rights and it's your decision whether or not to have a lawyer. Do you want me to read you your rights again?"]

If the suspect does not ask to have rights read again and agrees to continue to speak to the officer, then the questioning may continue. If the suspect clearly states that he or she does not want to speak to the officer without a lawyer present, then the officer shall stop the questioning.

5. In juvenile cases, the failure to record custodial interrogations may result in suppression of unrecorded statements.
6. Sec. 968.073, Wis. Stats., makes electronic recording statewide policy for custodial interrogations of adults in felony cases. Pursuant to Sec. 972.115, Wis. Stats., failure to record in adult felony cases may result in a jury instruction stating that electronic recording is statewide policy and that the failure to record can be considered in evaluating the evidence surrounding the making of a statement.

#### L. Recording of Custodial Questioning Procedures.

Officers engaged in recording custodial questionings should follow the following procedures:

1. Before beginning a recording, ensure that the recording device has enough recording space remaining to record a complete interview, or that additional recording space is reasonably available.
2. If using a device that requires tapes or DVDs, use new media, if possible, rather than re-use old media.

3. When preserving the event on removable media, write directly on the label the following:

Officer's name

Case number

The name of the person being questioned

The date, time and location of the questioning

4. When ready to begin custodial questioning, turn the recording device(s) on at the beginning, without asking for the suspect's permission. If the suspect refuses to talk while being recorded, that refusal will be recorded.
5. Before beginning a recording, consider giving notice of recording (under Wisconsin law, giving such notice is not required but is advisable). One option is to post a public notice of recording in the vicinity of the interview room or by simply advising the subject that departments recording equipment is engaged.
6. If using a video recorder, try to position the device to capture the physical images and words of both the questioner and the suspect.
7. If using an audio recorder, position the device to capture the words of all participants in the questioning.
8. At the beginning of a recording, allow the device(s) to record approximately ten (10) seconds of blank space in which no speaking occurs. After approximately ten (10) seconds have elapsed, identify yourself, case name or number, name of person being questioned and the date, time and location of questioning. Date and time "stamping" of video recording is encouraged.
9. Confirm with the suspect, on the recording, that this is the beginning of the contact.
10. Try to ensure that suspects' statements will be audible and comprehensible on playback. If a suspect makes a statement in a soft voice or does not enunciate clearly, ask the suspect to repeat himself/herself. If a suspect uses slang that might be difficult for a future audience to comprehend, ask the suspect to clarify the statement by using more conventional language.
11. If the recording device stops functioning at any point during the interview, wait for an appropriate opportunity to pause the questioning. Determine whether the recording device can be restored. If it cannot be restored, other recording devices should be utilized. If no other recording devices are available, the officer should use discretion to determine whether questioning should be continued without recording or whether it should be resumed at a later time.
12. Document in writing the time and nature of any irregularities that occur with the recording equipment.

13. Record the entire contact. Keep the recording device running continuously during the entire session, including during all breaks.

During questioning, if the suspect asks for and receives food, drink, cigarettes, access to public toilet, etc., these matters should be noted on the recording. However, recording a suspect when an officer is not present with the suspect poses potential wiretapping/surveillance issues.

14. Recording is not a substitute for taking written statements. If appropriate, before concluding custodial questioning, ask the suspect to write and sign a statement.
15. When custodial questioning is complete, state your name, case name or number, name of the person being interviewed or questioned, and the date, time, and location of the questioning.
16. In order to support investigation and future prosecution, write a report summarizing what occurred during custodial questioning.
17. Catalog and store recordings in the same manner as other items created or collected during an investigation.
18. For additional information on processing digital recordings, see *Admissibility and Preservation Issues for Digital Audiovisual Files*, by Attorney General Peg Lautenschlager, November 22, 2005 (available on the internet at

<https://wilnet.org>).DOM

M. Procedures Specific to Handheld Recording Devices. Officers engaged in using handheld recording devices when recording custodial interrogations should:

1. Before leaving the police department, check the device at the beginning of each day to make sure it is working properly. If the device is not working properly, follow Department procedures for documenting this. Obtain a replacement, if possible.
2. Before leaving the station, ensure that the recording device has a sufficient power supply and a sufficient amount of storage media.
3. When leaving any device unattended, stow it in a controlled or secure place.
4. Most handheld recorders have multiple recording modes. Use a mode that creates recordings of a sufficient quality.

N. Restrictions on Using Recording Devices:

1. Recording Devices shall only be used in conjunction with official duties primarily including but not limited to the investigation and/or reporting of crimes or other violations of the law.

2. Officers may not activate Recording Devices to surreptitiously record:
  - a) Communications with other police personnel without the permission of the Chief of Police.
  - b) Conversations that concern matters over which the person being recorded would have a reasonable expectation of privacy.
3. Recording Devices are utilized primarily by sworn personnel as authorized by this agency. Officers who are assigned Recording Devices must utilize such equipment unless otherwise authorized by supervisory personnel.
  - a) All Department issued Recording Devices and recorded media in any form issued by the department remain the exclusive property of the Department for use only as outlined in this Policy & Procedure.
  - b) No privately owned Recording Devices will be utilized by Department personnel while on duty for any reason without the prior authorization of the Chief of Police.

Michael Meeusen  
Chief of Police

This Policy & Procedure cancels and supersedes any and all written directives relative to the subject matter contained herein.

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